No. 85-608

In the Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF ILLINOIS, PETITIONER

v.

ALBERT KRULL, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether evidence seized in reasonable reliance upon a statute authorizing warrantless administrative searches should be admissible, even though the statute is subsequently found to violate the Fourth Amendment.

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INTEREST OF THE UNITED STATES

The issue in this case is whether evidence seized by a law enforcement officer in reasonable reliance upon a state statute authorizing a warrantless administrative search must be suppressed if the statute is subsequently found to violate the Fourth Amendment. The Court's analysis and resolution of that question is likely to shape the development of the "good faith" exception to the exclusionary rule recognized in *United States* v. *Leon*, 468 U.S. 397 (1984). This case therefore may have a significant impact upon the admissibility of evidence in federal criminal prosecutions.

STATEMENT

1. Illinois has adopted a comprehensive statutory scheme designed to curb trafficking in stolen automobile parts. Persons who sell motor vehicles, deal in automotive parts, process scrap metal, or engage

in similar businesses must obtain a license from the Secretary of State (Ill. Ann. Stat. ch. 95½, § 5-301 (Smith-Hurd Supp. 1986)). The licensees are required to maintain records setting forth the identification numbers of all motor vehicles and automobile parts that they purchase or sell (*id.* § 5-401.2). In 1981—when the events at issue in this case occurred—the statute required licensees to permit state officials to inspect these records and to allow "examination of the premises of the licensee's established place of business for the purpose of determining the accuracy of required records" (*id.* § 5-401(e) (Smith-Hurd Supp. 1984-1985)).[1]

On July 5, 1981, at approximately 10:30 a.m., Detective McNally, an officer of the Chicago police department, visited Action Iron and Metal Co., a wrecking yard operated by respondents.[2] When he arrived, Detective McNally saw tow trucks bringing automobiles into the yard and leaving without them. McNally approached respondent George Lucas, identified himself as a police officer, and asked whether

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[1] The inspection provision stated (Ill. Ann. Stat. ch. 95½, § 5-401(e) (Smith-Hurd Supp. 1984-1985)):

> Every record required to be maintained under this Section shall be open to inspection by the Secretary of State or his authorized representative or any peace officer for inspection at any reasonable time during the night or day. Such inspection may include examination of the premises of the licensee's established place of business for the purpose of determining the accuracy of required records.

The legislature added several limitations to this administrative inspection authority in 1982. See *id.* § 5-403 (Smith-Hurd Supp. 1986).

[2] Detective McNally's regular assignment was to inspect automobile wrecking yards pursuant to the state statute authorizing such inspections (9/25/81 Tr. 12).

the yard was open for business. Lucas stated that the yard was open and that he was in charge of purchasing automobiles. McNally then asked Lucas whether he could examine the yard's auto parts license and the records of its motor vehicle purchases. Lucas stated that he did not know where the license and the formal records were located, but he gave the officer a pad of paper that Lucas said was a record of the vehicles that had been purchased by Action Iron. Detective McNally examined the pad of paper and then asked Lucas if he "had any objection to my looking at the cars in the yard." Lucas replied, "'Go right ahead.'" Pet. App. 5-6; 9/25/81 Tr. 24-26.

Detective McNally then looked at several vehicles in the yard and made notations of their serial numbers. After using his mobile computer to check the vehicle serial numbers against the identification numbers of stolen automobiles, McNally found that three of the vehicles in the yard had been stolen. He also noted that the vehicle identification number had been removed from a fourth vehicle. The officer then seized the vehicles and arrested respondent Lucas. Respondent Krull, the holder of the license for the wrecking yard, and respondent Mucerino, who was present in the yard on the day of the search, were arrested later. Pet. App. 6-7; 9/25/81 Tr. 8-9, 11-12, 18-19, 26. Respondents were charged with various criminal violations of the Illinois motor vehicle statutes, including possession of stolen motor vehicles, failure to surrender proper certificates of title, and failure to obtain a junking certificate (see Ill. Ann. Stat. ch. 95½, §§ 4-103(a)(2) and (4), 3-116(c) (Smith-Hurd Supp. 1986)).

2. The trial court granted respondents' motion to suppress the evidence. The court observed that the day after the search at issue in this case, a federal

district court had declared the statute authorizing the inspection of wrecking yards unconstitutional. See *Bionic Auto Parts & Sales, Inc.* v. *Fahner*, 518 F. Supp. 582 (N.D. Ill. 1981), vacated on other grounds, 721 F.2d 1072 (7th Cir. 1983).[3] The trial court in the present case adopted the reasoning of the district court in *Bionc Auto Parts* and held that the "declaration of unConstitutionality [*sic*] of that Statute affects all pending prosecutions not completed. And therefore, I'm going to sustain the motion based on the District Court's ruling of unConstitutionality [*sic*]" (9/25/81 Tr. 31).

The Illinois intermediate appellate court vacated the trial court's decision and remanded the case for further proceedings (*People* v. *Krull*, No. 81-2621 (Nov. 23, 1983)). The appellate court noted that one of the State's arguments was that suppression of the evidence was not appropriate because the officer "acted in good faith when [he] relied on this statute" (slip op. 2). The appellate court therefore directed the trial court to make a determination regarding the good faith issue and to reconsider the constitutionality of the statute in light of the subsequent decision of the Seventh Circuit in the *Bionic Auto Parts* case (*Krull*, slip op. 5).

On remand, the trial court reaffirmed its decision granting the motion to suppress. It declined to reconsider its original ruling regarding the constitutionality of the statute, stating that its "original ruling that this particular section is unconstitutional will stand" (7/9/84 Tr. 9). The court further held that a police officer's good faith is relevant only in cases in which the officer acts pursuant to a warrant. The court therefore ruled that its decision to grant the motion to suppress would not be affected even if it found that Detective McNally had acted in good faith (*id.* at 10).

3. The Supreme Court of Illinois affirmed (Pet. App. 1-24).[4] The court noted that "some legislative schemes authorizing warrantless administrative searches have survived fourth amendment scrutiny" because "the assurance of regularity afforded by a warrant may be unnecessary where there has been a long and extensive regulatory presence in a certain industry" (*id.* at 12). The court found that "[t]here is certainly a strong public interest in preventing the theft of automobiles and the trafficking in stolen automobile parts" and that the statute at issue in this case furthered that "strong public policy" (*id.* at 15). The court also found that it was "reasonable to assume that warrantless administrative searches are necessary in order to adequately control the theft of automobiles and automotive parts" (*id.* at 16). The court concluded that the statute was unconstitutional, however, because it "vested State officials with too much discretion to decide who, when, and how long to search" (*ibid.*).

The court rejected the State's argument that the search could be upheld because the officer acted in "'good faith' reliance" on the statute authorizing the search. It observed that the authority cited by the

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[3] The district court in *Bionic Auto Parts* found that the statute did not impose sufficient limitations upon law enforcement officers' discretion and therefore violated the Fourth Amendment (518 F. Supp. at 585-586). The Illinois legislature amended the statute in 1982 to limit the timing, frequency, and duration of the administrative searches. On the appeal from the district court's order, the Seventh Circuit declined to address the validity of the original statute, but held that the amended statute satisfied the requirements of the Fourth Amendment (721 F.2d at 1075).

[4] The State appealed directly to the Supreme Court of Illinois pursuant to Ill. Sup. Ct. R. 603.

State—*Michigan* v. *DeFillippo*, 443 U.S. 31 (1979) —was inapposite because that case concerned an officer's reliance upon a substantive statute defining a criminal offense. The court stated that "an arrest and search made pursuant to a procedural statute, not yet declared unconstitutional, * * * which authorizes unlawful searches, will not be upheld, even though the arrest and search were made in good-faith reliance on the statute" (Pet. App. 20). The court observed that the statute at issue here "did not define a substantive criminal offense. Rather, it directly authorized warrantless searches" (*id.* at 21). The court therefore concluded that "[a]ny good-faith reliance on such a [procedural] statute will not cure an otherwise illegal search" (*ibid.*).[5]

SUMMARY OF ARGUMENT

The search of the automobile wrecking yard at issue in this case was authorized by a state statute that comprehensively regulated such businesses. This Court repeatedly has recognized that an administrative search of a regulated business is permissible under the Fourth Amendment without a warrant and without a showing of probable cause, as long as the statute authorizing the search satisfies certain requirements. The Illinois Supreme Court found that the statute authorizing the search at issue in this case did not comply with these requirements (Pet. App. 12-16), and petitioner has not sought review of that determination. The sole question in this case, therefore, is whether the exclusionary rule should be applied to suppress the probative evidence that was discovered in the search of the automobile wrecking yard.

[5] The court also rejected the State's contention that respondent Lucas had consented to the search (Pet. App. 22-24).

We submit that this Court's decision in *United States* v. *Leon*, 468 U.S. 897 (1984), compels the conclusion that the application of the exclusionary rule is wholly inappropriate when a law enforcement officer conducting an administrative search acts with the objectively reasonable, although erroneous, belief that the statute authorizing the search satisfied the requirements of the Fourth Amendment. Since the officer who conducted the search in this case reasonably believed that the Illinois statute complied with the relevant constitutional standard, the evidence obtained as a result of that search should not be suppressed.

A. The weighing of the costs and benefits of applying the exclusionary rule leads to the same conclusion in this case as in the case of the warrant-authorized searches that were at issue in *Leon*. The purpose of the exclusionary rule is to deter police misconduct. Yet the exclusionary rule will not have that deterrent effect if the police reasonably believe that their conduct is lawful—either because it is authorized by a presumptively valid warrant or because it is authorized by a presumptively valid statute. Nor is the exclusionary rule likely to have any significant effect in deterring legislators from enacting unconstitutional statutes. Legislators are not concerned with the outcome of particular criminal prosecutions, so it is highly unlikely that their legislative actions will be affected by the application of the exclusionary rule in a particular case. Moreover, because the exclusionary sanction in any event will apply in cases that arise after a statute has been held unconstitutional, the marginal effect upon legislators of requiring suppression in a case like this one will be minimal. Beyond that, parties who are aggrieved by an allegedly unconstitutional statute can often

obtain relief by challenging the statute in a civil action; the exclusionary rule is therefore not the only available remedy for deterring Fourth Amendment violations in the statutory context.

The costs of the exclusionary rule are at least as great in the case of searches authorized by a statute as they are in the case of searches authorized by a warrant. The principal cost, of course, is the loss of probative evidence from the truth-seeking process and the associated reduction in public confidence in the criminal justice system. In addition, however, there are special costs associated with the use of the exclusionary rule in connection with statutorily-authorized searches. Where a legislature has devised particular law enforcement techniques to help combat crime, the unduly broad application of the exclusionary rule can discourage cautious officers from using the investigative techniques authorized by the legislature for fear that a good faith error on their part will result in the suppression of important evidence. In that way, the purpose of the legislature in devising innovative law enforcement techniques may well be thwarted by the uncertainty that results from the threat of imposing the exclusionary sanction, even though an officer's conduct is objectively reasonable.

B. In this case, the officer's reliance on the constitutionality of the Illinois statute was clearly reasonable. If the statute was unconstitutional, it was only barely so; the flaw in the statute was at worst a technical one. The statute certainly was not so patently unconstitutional that the officer should have recognized its flaws and refused to exercise the authority conferred by the legislature.

Moreover, the officer's conduct in executing the search was entirely reasonable. His actions were consistent with the terms of the Illinois statute after it was amended to answer the constitutional objections that were raised shortly after the search in this case. Therefore, to apply the exclusionary rule in this case would be particularly pointless. It would provide respondents with the windfall of suppression, even though the alleged constitutional error did not result in a search that was any more intrusive than the search could have been if the legislature had enacted the more precise version of the statute in the first place.

ARGUMENT

THE EVIDENCE DISCOVERED AS A RESULT OF THE STATUTORILY-AUTHORIZED ADMINISTRATIVE SEARCH IN THIS CASE SHOULD NOT BE SUPPRESSED

A. The Exclusionary Rule Should Not Be Applied When A Law Enforcement Officer Conducts A Search In Reasonable Reliance Upon The Statute Authorizing The Search

1. It is by now well settled that the Constitution does not require that the exclusionary rule be applied in every case in which law enforcement officers fail to comply with the Fourth Amendment. Thus, "[t]he Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands, and an examination of its origin and purposes makes clear that the use of fruits of a past unlawful search or seizure 'work[s] no new Fourth Amendment wrong.'" *United States* v. *Leon*, 468 U.S. 897, 906 (1984), quoting *United States* v. *Calandra*, 414 U.S. 338, 354 (1974). Instead, the exclusionary rule is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States* v. *Calandra*, 414 U.S. at 348 (footnote omitted); see also *Leon*, 468 U.S. at 906; *Stone* v. *Powell*, 428 U.S. 465, 486 (1976).

In addition, "[a]s with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *United States* v. *Calandra*, 414 U.S. at 348; see also *Leon*, 468 U.S. at 908 ("[c]lose attention to [the rule's] remedial objectives has characterized [the Court's] recent decisions concerning the scope of the Fourth Amendment exclusionary rule"). The propriety of applying the exclusionary rule in a particular situation turns upon "weighing the costs and benefits" of withholding from the truth-seeking process reliable evidence obtained in violation of the Fourth Amendment. *Leon*, 468 U.S. at 907; see also *id.* at 908-913 (cataloging circumstances in which the Court has found suppression of evidence unwarranted because the possible benefits of suppression did not outweigh the costs of applying the exclusionary rule); *United States* v. *Janis*, 428 U.S. 433, 454 (1976); *United States* v. *Calandra*, 414 U.S. at 351-352.

This Court held in *Leon* that because "the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion," the exclusionary rule should not be applied when an officer reasonably relies upon a search warrant issued by a magistrate (468 U.S. at 922). The balance of the relevant factors in the present context plainly shows that suppression is similarly unjustified. As we demonstrate below, the societal costs of applying the exclusionary rule when an officer conducts a search in reasonable reliance upon a subsequently invalidated statute far outweigh the highly unlikely possibility that suppression of the evidence will result in the deterrence of official misconduct.

2. The distinction between this case and *Leon* is that in *Leon* the search was authorized by a warrant issued by a magistrate, while in this case the search was authorized by a statute enacted by a legislature. That distinction does not support a difference in result or even a significant difference in analysis. As the Court stated in *Leon*, the purpose of the exclusionary rule is to "deter police misconduct" (468 U.S. at 916).[6] The rule is not designed to punish magistrates for issuing improper warrants or legislators for erroneously enacting unconstitutional statutes. The effect upon legislators of exclusion therefore is simply not relevant in assessing the efficacy of the rule. Yet even if the proper purposes of the exclusionary rule included deterring legislators from enacting unconstitutional statutes, the suppression of evidence obtained in reasonable reliance upon a statute would not be likely to have any such deterrent effect.

First, this Court's observation that "there exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment" (*Leon*, 468 U.S. at 916) applies with equal force to legislators.[7] There is no indication that

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[6] The benefit thought to be derived from the exclusionary rule is that the suppression of probative evidence will deter Fourth Amendment violations by removing any incentive that law enforcement agents might have to engage in such unlawful conduct. *Leon*, 468 U.S. at 906, 909-913. As this Court has observed, "[t]he rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins* v. *United States*, 364 U.S. 206, 217 (1960); see also *Michigan* v. *Tucker*, 417 U.S. 433, 447 (1974).

[7] The oaths taken by members of Congress and state legislators must include a commitment to support the federal Constitution (U.S. Const. Art. VI, Cl. 3).

either Congress or the state legislatures have enacted any significant number of statutes permitting searches violative of the Fourth Amendment. Legislatures generally have confined their efforts to authorizing searches of specific categories of businesses, and the resulting statutes typically have been held to be constitutional. See, *e.g.*, *Donovan* v. *Dewey*, 452 U.S. 594 (1981); *United States* v. *Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970); *United States* v. *Jamieson-McKames Pharmaceuticals, Inc.*, 651 F.2d 532 (8th Cir. 1981), cert. denied, 455 U.S. 1016 (1982); *United States* v. *Raub*, 637 F.2d 1205 (9th Cir.), cert. denied, 449 U.S. 922 (1980); 3 W. LaFave, *Search and Seizure* § 10.2, at 132-134 n.89.1 (Supp. 1986) (collecting cases).[8] There has been no showing of the kind of compelling need to discourage state and federal legislators from enacting unconstitutional statutes that would be required to justify the "extreme sanction of exclusion" (*Leon*, 468 U.S. at 916).

Second, and more important, the application of the exclusionary rule is unlikely to have any significant deterrent effect upon the actions of Congress or a state legislature. Legislators enact statutes for general, programmatic purposes, not to permit particular conduct in connection with a particular criminal investigation. Their goal is to enact a statute that

[8] Just as a magistrate sometimes may err in deciding to issue a warrant, legislatures have sometimes enacted statutes that do not comply with the Fourth Amendment. See, *e.g.*, *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978); *Berger* v. *New York*, 388 U.S. 41 (1967). However, these lapses do not indicate that legislators are attempting to subvert the Fourth Amendment. The enactment of these statutes more likely reflects legislators' good faith, but erroneous, assessment of the relevant Fourth Amendment standards.

will be held constitutional; the admissibility of evidence in the particular case in which the constitutional issue will be decided is wholly irrelevant to that goal. For that reason, legislators are far more likely to be influenced by the courts' substantive Fourth Amendment rulings regarding the validity of statutes than by the courts' application of the exclusionary rule in particular cases.

The question whether the exclusionary rule should be applied in cases such as this one—where the search was conducted before an adjudication of the statute's constitutionality—is likely to affect only a small number of prosecutions. That is because after a statute is declared unconstitutional, evidence obtained pursuant to that statute would be subject to suppression on the ground that a police officer's reliance on the constitutionality of the statute would no longer be objectively reasonable. The applicability of the exclusionary rule in the present setting therefore will be of far less concern to legislators than the underlying Fourth Amendment ruling, which will determine the overall validity of the statutory scheme and will affect the admissibility of evidence in all cases subsequent to the first definitive constitutional ruling. As a result, it is highly unlikely that the application of the exclusionary rule in this context would have any effect upon the legislators' actions.

A third reason that the exclusionary rule is not a necessary or appropriate method of deterring legislatures from enacting unconstitutional statutes is that statutes often can be challenged in other, more effective ways. In many circumstances, persons subject to searches pursuant to an allegedly unconstitutional statute can bring a pre-enforcement action seeking a declaration that the statute is unconstitutional and an injunction barring law enforcement

officers from conducting searches pursuant to the statute. Indeed, this course of action was followed with respect to the very statute that is at issue in this case. See *Bionic Auto Parts & Sales, Inc.* v. *Fahner*, 518 F. Supp. 582 (N.D. Ill. 1981), vacated on other grounds, 721 F.2d 1072 (7th Cir. 1983).[9] The availability of this form of relief, which generally cannot be used to challenge the validity of individual warrant-authorized searches, makes the case for using the exclusionary rule as a remedy even less compelling here than in cases involving searches based upon a warrant.

Finally, there is no need to use the exclusionary rule to deter legislatures from enacting unconstitutional statutes, because under the principles set forth in *Leon*, evidence obtained pursuant to clearly unconstitutional statutes is already subject to suppression. If a legislature enacts a statute that is flagrantly unconstitutional, it is likely that law enforcement officers' reliance on that statute—even before the statute is struck down by a court—would be found to be objectively unreasonable. In that setting, the analysis set forth in *Leon* would require the suppression of the evidence seized under the authority of the statute. While *Leon* teaches that the exclusionary rule "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity" (468 U.S. at 919), police conduct that is "flagrantly abusive of Fourth Amendment rights" is the kind of conduct that is most likely to be influenced by

[9] Similar pre-enforcement actions have been brought to challenge other statutes authorizing administrative searches. See, *e.g.*, *Rush* v. *Obledo*, 756 F.2d 713 (9th Cir. 1985); *In re Surface Mining Regulation Litigation*, 456 F. Supp. 1301 (D.D.C. 1978), aff'd in part and rev'd in part, 627 F.2d 1346 (D.C. Cir. 1980).

the sanction of exclusion. *Brown* v. *Illinois*, 422 U.S. 590, 610-611 (1975) (Powell, J., concurring); see also *Leon*, 468 U.S. at 923; *Michigan* v. *Tucker*, 417 U.S. 433, 447 (1974) ("[t]he deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct"). Accordingly, the rule for which we contend would not leave searches conducted pursuant to a statute altogether immune from the exclusionary rule, even before the statute was challenged in court. It would simply confine the exclusionary rule to the cases of flagrantly unconstitutional statutes, where the rule could reasonably be expected to have a useful deterrent effect.

In the more typical case involving a statute that is not obviously unconstitutional, the threat of the exclusion of evidence in a particular case will not deter either the legislature or the police. If a well-trained officer reasonably believes that a proposed search is constitutional, the threat of exclusion will not deter the officer from conducting the search, because the officer would have no reason to believe that any evidence discovered in the search was in danger of being suppressed. Application of the exclusionary rule thus cannot deter unconstitutional conduct when the officer reasonably believes that his conduct is constitutional. As the Court stated in *Leon*, "[W]here the officer's conduct is objectively reasonable, 'excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that . . . the officer is acting as a reasonable officer would and should act in similar circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty.'" 468 U.S. at 919-920 (citation omitted); see also *Brown* v. *Illinois*, 422 U.S. at 611-612 (Powell, J., concurring); *Michigan* v. *Tucker*,

417 U.S. at 447 ("[w]here the official action was pursued in complete good faith * * * the deterrence rationale loses much of its force"). Thus, suppressing evidence obtained as the result of an officer's reasonable reliance upon a statute authorizing him to conduct a search will not have the deterrent effect that is the only benefit to be derived from the exclusionary rule.

In *United States* v. *Peltier*, 422 U.S. 531 (1975), the Court reached precisely the same conclusion in a closely analogous context. The Court had held in *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973), that warrantless nonborder searches conducted without probable cause violated the Fourth Amendment, even though the searches were conducted pursuant to a statute authorizing such searches "within a reasonable distance" of the border. *Almeida-Sanchez* was decided four months after the search at issue in *Peltier*; the question in *Peltier* was whether *Almeida-Sanchez* shcuild be applied retroactively to require the suppression of evidence obtained as a result of that search.

The Court noted that the Border Patrol agents who conducted the search in *Peltier* acted "in reliance upon a validly enacted statute, supported by longstanding administrative regulations and continuous judicial approval [in] stopp[ing] and search-[ing] [the defendant's] automobile" (422 U.S. at 541). Observing that deterrence is the sole justification for the exclusionary rule, the Court stated that "evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment" (*id.* at 542). Since the agents who conducted the search in

Peltier could not be charged with such knowledge, the Court concluded that "nothing in the Fourth Amendment, or in the exclusionary rule fashioned to implement it, requires that the evidence * * * be suppressed" (*ibid.*).

The analysis in *Peltier* applies with equal force in this case. As in *Peltier*, the application of the exclusionary rule when an officer acts in reasonable reliance upon a statute simply will not afford the deterrence that the rule is designed to provide.[10]

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[10] The approach to the retroactivity issue taken by the Court in *United States* v. *Johnson*, 457 U.S. 537 (1982), does not undercut this analysis. The question in *Johnson* was whether to accord retroactive effect to the decision in *Payton* v. *New York*, 445 U.S. 573 (1980), which prohibited a warrantless nonconsensual entry into a suspect's home to effect a routine arrest. In holding that *Payton* applied retroactively, the Court was concerned with ensuring the fair treatment of persons who were in the same situation as the defendant in *Payton*. If the decision had not been accorded retroactive effect, the defendant in *Payton* would have obtained the benefit of the rule announced in that case, while others whose cases were pending on review at the time would have been denied that benefit. See 457 U.S. at 554-556.

The Court in *Johnson* did reject the government's argument that *Peltier* indicated that only decisions addressing settled Fourth Amendment issues should be applied retroactively. It stated that "[f]ailure to accord *any* retroactive effect to Fourth Amendment rulings would 'encourage police or other courts to disregard the plain purport of our decisions and to adopt a let's-wait-until-it's-decided approach' " (457 U.S. at 561 (citation omitted; emphasis in original)). However, this statement does not preclude the adoption of the reasonableness exception to the exclusionary rule for which we contend in the present case. That exception would not enable an officer to disregard the "plain purport" of a decision of this Court; if the only reasonable interpretation of this Court's decision was that the officer's conduct was unconstitutional, the officer would not be able to show that he reasonably believed that his conduct was constitutional. In that setting,

3. Even if the application of the exclusionary rule in this context could have some marginal deterrent effect, that effect would be insufficient to outweigh the rule's "substantial social costs." *Leon*, 468 U.S. 909; see also *Illinois* v. *Gates*, 462 U.S. 213, 257-258 (1983) (White, J., concurring) ("any rule of evidence that denies the jury access to clearly probative and reliable evidence must bear a heavy burden of justification, and must be carefully limited to the circumstances in which it will pay its way by deterring official lawlessness"); *United States* v. *Janis*, 428 U.S. at 454 (in the absence of "appreciable deterrence," application of the exclusionary rule is not appropriate); *Alderman* v. *United States*, 394 U.S. 165, 174-175 (1969).

This Court has repeatedly recognized the exclusionary rule's "heavy costs to rational enforcement of the criminal law." *Stone* v. *Powell*, 428 U.S. at 500 (Burger, C.J., concurring); see also *Leon*, 468 U.S. at 907 ("[t]he substantial social costs exacted by the exclusionary rule * * * have long been a source of concern"). The rule excludes from consideration at trial evidence that is both relevant and trustworthy, thereby subverting the truthfinding function of both judge and jury. *Stone* v. *Powell*, 428 U.S. at 489-490; *United States* v. *Janis*, 428 U.S. at 448-449.

Moreover, as the Court observed in *Leon* (468 U.S. at 907-908 (footnote omitted)):

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applying the exclusionary rule would be appropriate. Thus, the Court's conclusion in *Leon* that "nothing in *Johnson* precludes adoption of a good-faith exception tailored to situations in which the police have reasonably relied on a warrant issued by a detached and neutral magistrate but later found to be defective" (468 U.S. at 912 n.9) also applies with respect to the reasonableness exception at issue in this case.

> An objectionable collateral consequence of this interference with the criminal justice system's truth-finding function is that some guilty defendants may go free or receive reduced sentences as a result of favorable plea bargains. Particularly when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system.

Such results may well "generat[e] disrespect for the law and administration of justice" (*Stone* v. *Powell*, 428 U.S. at 491).

An additional cost is imposed upon society when evidence is excluded even though the officer who obtained the evidence reasonably believed that he was acting in conformity with the requirements of the Fourth Amendment. To the extent that the exclusionary rule will have any deterrent effect at all in that situation, it is likely to have a chilling effect upon legitimate police activities. Since the police officer's reasonable belief in the constitutionality of his actions could not ensure the admissibility of evidence obtained pursuant to a search, a cautious officer might be unwilling to engage in any but the most well-settled, traditional law enforcement activities in order to avoid the possibility of suppression. Such excessive caution might well lead an officer to forgo certain investigative conduct, even though that conduct would be entirely consistent with the Fourth Amendment. As Justice White has observed, "[t]o the extent the rule operates to discourage police from reasonable and proper investigative actions, it hinders the solution and even the prevention of crime." *Illinois* v. *Gates*, 462 U.S. at 258 (concurring opinion); see also *Leon*, 468 U.S. at 919-920.

This chill upon permissible law enforcement activities is a matter of special concern in the present context because if the exclusionary rule is applied to cases such as this one, law enforcement officers may be deterred from using investigative powers that were specifically granted by the legislature, even though those powers fully comply with the Fourth Amendment. To apply the exclusionary rule in that manner would thwart the will of the legislature by discouraging law enforcement officers from making use of authority set forth in a valid statute. Instead of deterring unconstitutional law enforcement activity, exclusion might well deter constitutional conduct specifically authorized by the legislature, with the result that unlawful activity will go undetected, or more efficient law enforcement techniques designed by the legislature for use in combatting crime will go unused. The costs associated with applying the exclusionary rule in cases involving presumptively constitutional statutes are therefore potentially even greater than the costs of excluding evidence obtained pursuant to a presumptively valid warrant.

4. In refusing to recognize an exception to the exclusionary rule in this case, the Illinois Supreme Court relied in large part upon this Court's decision in *Michigan* v. *DeFillippo*, 443 U.S. 31 (1979). The Illinois court concluded that *DeFillippo* requires the suppression of evidence whenever the evidence is obtained pursuant to a search that is authorized by a statute subsequently found to be unconstitutional. We submit that the Illinois court erred in concluding that the substantive Fourth Amendment rule set forth in *DeFillippo* controls the entirely different question presented in this case regarding the proper scope of the exclusionary rule.

The defendant in *DeFillippo* was arrested for violating a local ordinance that required any person

stopped by the police to identify himself and to produce evidence of his identity. A search incident to the arrest disclosed that the defendant was in possession of illegal drugs. The defendant was tried on a drug charge; prior to trial he sought to suppress the evidence obtained in the search incident to the arrest on the ground that the local ordinance that was the basis for the arrest was unconstitutional.

This Court held that the search did not violate the Fourth Amendment because it was incident to a valid arrest. The appropriate test for evaluating the validity of the arrest, the Court stated, was whether the officer had " 'probable cause' to justify an arrest" (443 U.S. at 37). The Court stated that the unconstitutionality of the ordinance did not preclude the arresting officer from possessing probable cause because "[a] prudent officer, in the course of determining whether [the defendant] had committed an offense under all the circumstances shown by this record, should not have been required to anticipate that a court would later hold the ordinance unconstitutional" (*id.* at 37-38). Since "the conduct observed violated a presumptively valid ordinance" (*id.* at 37), the officer "had probable cause to believe [the defendant] was committing an offense in his presence" (*id.* at 40).

The Court distinguished the local ordinance involved in *DeFillippo* from "statutes which, by their own terms, authorized searches under circumstances which did not satisfy the traditional warrant and probable-cause requirements of the Fourth Amendment" (443 U.S. at 39). Observing that several of its previous decisions had invalidated searches conducted in reliance upon procedural statutes of this type, the Court stated, "[w]e have held that the exclusionary rule required suppression of evidence

obtained in searches carried out pursuant to statutes, not previously declared unconstitutional, which purported to authorize the searches in question without probable cause and without a valid warrant" (*ibid.*).

Although it is true that the decisions cited by the Court directed the suppression of evidence, those decisions addressed substantive Fourth Amendment rules, not the issue of when the exclusionary rule should be applied. The statement in *DeFillippo* concerning statutes that authorize searches violative of the Fourth Amendment therefore must have been intended to make clear that searches conducted pursuant to such statutes *do* violate the Fourth Amendment, in contrast to the arrest in *DeFillippo*, which the Court specifically found did *not* violate the Fourth Amendment (443 U.S. at 39-40). The Court in *Leon* specifically acknowledged this fact by citing both *DeFillippo* and the cases identified in *DeFillippo* and stating that "[t]he *substantive Fourth Amendment principles* announced in those cases are fully consistent with our holding here" (468 U.S. at 912 n.8 (emphasis added)).

The determination whether the exclusionary rule should apply to remedy a particular Fourth Amendment violation is, of course, a question that is entirely separate from whether a Fourth Amendment violation exists in the first place. Because the *DeFillippo* decision did not address the availability of the reasonable mistake exception to the exclusionary rule for evidence obtained in searches authorized by statute, the language from *DeFillippo* on which the Illinois Supreme Court relied does not foreclose the recognition of such an exception in this case. See *Illinois* v. *Gates*, 462 U.S. at 256 n.12 (White, J., concurring) (observing that "[t]he results in these cases may well be different under a

'good-faith' exception to the exclusionary rule"). To the contrary, for the reasons we have discussed, this Court's precedents concerning the exclusionary rule strongly support the recognition of such an exception, because the costs of withholding probative evidence from the truth-seeking process far outweigh any benefits that could be obtained by applying the exclusionary rule in this setting.

B. The Law Enforcement Officer Who Conducted The Search In This Case Could Reasonably Believe That The Statute Authorizing The Search Complied With The Fourth Amendment

This Court has several times upheld the constitutionality of statutes authorizing warrantless administrative inspections. See *Donovan* v. *Dewey*, 452 U.S. 594 (1981); *United States* v. *Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970). The Court has explained that warrantless inspections are permissible in such cases because the authorizing statute serves as "a valid substitute for a warrant." *Donovan* v. *Dewey*, 452 U.S. at 603.

In order to serve that function, the statute authorizing the search must satisfy three prerequisites. First, the statute must be directed at a specific industry that is pervasively regulated. That requirement ensures that the administrative inspection scheme will not invade legitimate expectations of privacy with regard to business records and premises. See *Donovan* v. *Dewey*, 452 U.S. at 600; *United States* v. *Biswell*, 406 U.S. at 316-317.

Second, there must be a compelling public interest in performing inspections without a warrant. See *Donovan* v. *Dewey*, 452 U.S. at 600-602; *United States* v. *Biswell*, 406 U.S. at 315-317; *Camara* v. *Municipal Court*, 387 U.S. 523, 538 (1967); *See* v.

City of Seattle, 387 U.S. 541 (1967). The requirement that the legislation be directed at industries in which there is an objectively discernible public need for warrantless inspections serves as a substitute for the Fourth Amendment's requirement that a neutral party determine that there is a sufficient justification for issuing the warrant.

Third, the statute must restrict the discretion of the agents who conduct the inspections. See *Donovan* v. *Dewey*, 452 U.S. at 599, 601; *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 323 (1978). That requirement serves some of the same functions as the "particularity" requirement of the Fourth Amendment applicable to warrant-authorized searches.

The statute at issue in this case clearly satisfied at least two of these requirements. First, as the Seventh Circuit noted in upholding the constitutionality of the amended statute, the Illinois statute is directed at a pervasively regulated industry—the automotive parts industry—which the State of Illinois has for many years supervised through a system of licensing and inspection (*Bionic Auto Parts & Sales, Inc.* v. *Fahner*, 721 F.2d at 1079). Second, as both the Seventh Circuit and the Illinois Supreme Court acknowledged, the Illinois statute was designed to serve the strong public interest in preventing the theft of automobiles and trafficking in stolen automotive parts (Pet. App. 15; 721 F.2d at 1077-1078). Those courts also found that the legislature acted reasonably in concluding that warrantless administrative inspections were necessary to the effectiveness of the inspection system (Pet. App. 15-16; 721 F.2d at 1078).

The defect in the statute found by the Illinois Supreme Court related to the third requirement for a valid administrative inspection statute. The court

concluded that the statute vested the law enforcement officials with "too much discretion to decide who, when, and how long to search" (Pet. App. 16; see also *Bionic Auto Parts & Sales, Inc.* v. *Fahner*, 518 F. Supp. at 585-586).

Regardless of the correctness of that determination, we submit that it is beyond dispute that Detective McNally reasonably could have believed that the search he conducted pursuant to the statute was valid under the Fourth Amendment. Two separate theories support the reasonableness of his conduct.

1. The question of the constitutionality of the statute is a close one, and the court's objection to the statute is quite technical. Unlike the statutes discussed in this Court's decision in *Marshall* v. *Barlow's, Inc.*, *supra*, and *See* v. *City of Seattle*, *supra*, the Illinois statute was directed at a single, pervasively regulated industry in which the public interest clearly justified warrantless inspections. On the basis of those factors alone, this Court's decisions in *Colonnade Catering Corp.* v. *United States*, *supra*, and *United States* v. *Biswell*, *supra*, provide substantial support for the constitutionality of the Illinois statute. See also *Donovan* v. *Dewey*, 452 U.S. at 601 (distinguishing *Marshall* v. *Barlow's, Inc.*, *supra*, on the ground that the administrative search provisions in that case were not tailored to the "numerous and varied businesses regulated by the statute").

To be sure, the Illinois statute did not contain detailed provisions regulating the timing of inspections. The statute, however, required the inspections to be performed at "reasonable" times, and it contained restrictions on the nature and purpose of the inspections. It also limited the scope of the inspections to (1) the records that the businesses were required to maintain, and (2) the business premises,

but only to the extent necessary to determine the accuracy of the required records. Ill. Ann. Stat. ch. 95½, § 5-401(e) (Smith-Hurd Supp. 1984-1985). While the restrictions on the inspectors' discretion were not as detailed as those in the statute upheld by this Court in *Donovan* v. *Dewey*, *supra*, they were more elaborate than those found to be inadequate in *Marshall* v. *Barlow's, Inc.*, *supra*.

One measure of how close the original Illinois statute came to satisfying constitutional requirements is the fact that the Seventh Circuit upheld the amended version of the statute, even though the amendments made only minor changes in the original statutory scheme. See *Bionic Auto Parts & Sales, Inc.* v. *Fahner*, 721 F.2d 1072 (7th Cir. 1983). The principal changes in the amended statute were: (1) to provide that the inspections would take place during work hours; (2) to provide that each inspection would not last more than 24 hours; (3) to permit a representative of the licensee to be present during an inspection; and (4) to ensure that no more than six inspections of one business location would be conducted within any six-month period. See Ill. Ann. Stat. ch. 95½, § 5-403 (Smith-Hurd Supp. 1986). Those changes were plainly directed at extreme cases of abuse of the regulatory process. The original statute, which permitted inspections to occur only at a reasonable time and to include the examination of the premises only to the extent necessary to determine the accuracy of the required records, could well have been construed to require inspectors to conduct themselves according to standards at least as restrictive as those that ultimately were embodied in the amended statute.

Because the question of the constitutionality of the Illinois statute was a close one, and because the

defect in the statute, if any, was technical and could have been cured by judicial construction, it would be particularly inappropriate to apply the exclusionary rule in this case. The unconstitutionality of the statute was not so clear that law enforcement officers could not "reasonably presume it to be valid." *United States* v. *Leon*, 468 U.S. at 923. Instead, it would have taken a most extraordinary police officer to appreciate the constitutional arguments for and against the Illinois statute and to conclude that the statute was unconstitutional, albeit just barely so.

Moreover, at the time of Detective McNally's entry into respondent's wrecking yard there had been no court decision invalidating the Illinois statute or even suggesting that the statute was constitutionally infirm. In fact, the Indiana Supreme Court had recently upheld the constitutionality of a similar statute permitting warrantless searches in the motor vehicle industry. *State* v. *Tindell*, 272 Ind. 479, 399 N.E.2d 746 (1980). In light of the then-recent decision in *Donovan* v. *Dewey*, *supra*, even the federal district court that subsequently struck down the Illinois statute suggested that the constitutional question was a difficult one (see *Bionic Auto Parts & Sales, Inc.* v. *Fahner*, 518 F.Supp. at 584, 586). Under those circumstances, Detective McNally could not reasonably have been expected to entertain doubts about the validity of the statute and to decline to exercise the statutory inspection authority.

2. A related reason for not applying the exclusionary rule in this case is that Detective McNally did not conduct his inspection in an unreasonable manner. In fact, Detective McNally's inspection was conducted in a fashion that apparently would have satisfied all of the requirements of the amended Illinois statute that was upheld by the Seventh Circuit.

The inspection was conducted during business hours (9/25/81 Tr. 25); it was apparently of short duration, and it certainly did not approach the 24-hour limit imposed by the amended statute (*id.* at 8-9, 11, 16); and there is no suggestion in the record that the inspection was part of a pattern of harassment of respondents' business by repeated, unjustified inspections within a short period of time.

In addition, Detective McNally was specifically assigned to inspect automobile wrecking yards (9/25/81 Tr. 12), and he performed his inspection not on a whim, but only after he saw several vehicles being towed into respondents' premises (*id.* at 25). Beyond that, the inspection was limited to the required records of vehicle transactions and the yard where the vehicles were kept (Pet. App. 5-7).[11]

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[11] Respondents contend (Br. in Opp. 18) that Detective McNally's inspection of the yard where the vehicles were stored was broader than the statute permits. Both the original and amended statutes, however, permitted the inspecting agent to examine the premises of the licensee's place of business "for the purpose of determining the accuracy of required records." Ill. Ann. Stat. ch. 95½, § 5-401(e) (Smith-Hurd Supp. 1984-1985). Respondent Lucas showed Detective McNally a record of the automobiles he had purchased for the business, which was the only version of the business's records that Lucas was able to produce (9/25/81 Tr. 26). Checking the automobiles in the yard was the only way Detective McNally could determine the accuracy and completeness of that record. In any event, the Illinois Supreme Court did not address the question whether Detective McNally exceeded the limits of his statutory authority when he ventured from the office into the wrecking yard and examined the vehicles that were stored there. That question, and the consequences that would flow from any such violation, are matters regarding the construction of the state statute that the Illinois courts can address on remand.

Thus, the constitutional complaint in this case was not with the conduct of the inspecting officer, but with the language of the authorizing statute. If the officer had conducted precisely the same inspection under the amended statute, the inspection would have been lawful.

To apply the exclusionary rule under these conditions would be especially inappropriate, since there was nothing about Detective McNally's conduct that should have been deterred. His conduct was entirely reasonable, and the search that he conducted would have been entirely permissible if it had been authorized by a better-drafted statute. It would extend the exclusionary rule far beyond any legitimate bounds to suppress evidence in a case such as this one, in which the officer behaved reasonably and the subject of the search was not prejudiced by the asserted constitutional error. Compare *United States* v. *Burke*, 517 F.2d 377, 386 (2d Cir. 1975) (suppression of evidence inappropriate where violation of Fed. R. Crim. P. 41 resulted in search by an unauthorized officer, but did not result in a violation of Fourth Amendment, and did not result in a more abrasive search than would have occurred absent the violation); *United States* v. *Harrington*, 681 F.2d 612, 615 (9th Cir. 1982), cert. denied, No. 84-1016 (Apr. 15, 1985) (lack of authority of officer conducting a search does not require suppression if other officers could have conducted same search); *United States* v. *Pennington*, 635 F.2d 1387, 1390 (10th Cir. 1980), cert. denied, 451 U.S. 938 (1981); *United States* v. *Dudek*, 530 F.2d 684, 688-689 (6th Cir. 1976); see generally *United States* v. *Donovan*, 429 U.S. 413, 432-439 (1977).

CONCLUSION

The judgment of the Supreme Court of Illinois should be reversed.

Respectfully submitted.

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